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PROPERTY RIGHTS OF MARRIED WOMEN IN KENTUCKY

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To understand the property rights of married women in Kentucky today, it is necessary to review briefly married women's rights under the common law and equity before statutory changes were made and then to note the modifications brought about by the legislative acts of 1846, 1868 and 1894, the last of which is known as the Weissinger Act.

Under the common law the legal identity of the wife was merged during marriage in that of the husband. The law took the scriptures literally and a husband and wife were considered one person; that one, however, was the husband.

In the first place all the personal property in the actual possession of the wife, that is, all the money and furniture she possessed, became the property of her husband upon marriage under the common law. All of her choses in action, in other words, her claims against third persons, debts owed her, also became the property of the husband if he reduced them to possession during coverture, during the period the marriage relation lasted. If the wife survived the husband, choses in action which the husband had not reduced to possession remained the wife's. Her leasehold estates, the husband might sell and keep the money received from them. On the wife's death any personal property that the husband had not already reduced to possession, became his property. The husband had the use during coverture of any real property that the wife owned. He could take the rents and profits therefrom as his own. If there was a child born of the marriage, which child might inherit the real property of the wife, the husband acquired by curtesy of the law of England, a life estate in such real property. The

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wife's real property on her death went to her heirs at once unless the husband had acquired a life interest by curtesy. The wife, should she survive her husband, acquired a life interest in one-third of the land the husband was seized of during coverture. This was called her dower interest and became hers whether children were born from the marriage or not.¹

These rules of common law were harsh and worked hardships not only upon the wife but upon her own family, especially in cases where the wife was possessed of large estates consisting wholly of personal property and died shortly after marriage. In such cases large amounts were shifted from one family to another. If the husband were to die shortly after coming into possession of his wife's personal property, it would go to his personal representatives, his next of kin, who really would have no moral right thereto.

Equity, however, interfered in behalf of married women and worked out rules governing their property rights possibly as complete if not more complete than the rights later given married women under the so-called Married Women's Acts. Equity was able to do this in the first place because in order to reduce a wife's chose in action to possession the husband was obliged to go to equity for help. Equity applied its well known maxim that "he who would have equity must do equity" and compelled the husband to make adequate provision for the wife out of her estate as a condition for lending its aid in reducing the chose in action to possession. If a legacy were left the wife for her sole and separate use the husband could not get it except through equity and the chancellor would impose a trust upon him for the benefit of the wife. This right of the wife was known as her right of *equity of interception*.

With the husband a trustee of the wife's estate, equity compelled him to do with the property as the wife directed. Of course it became an easy matter for him to induce her to direct that it be disposed of in a certain way and thus get it into his own hands. Lord Thurlow invented the remedy for this difficulty, restraint on anticipation, which made it impossible for her to alienate the property or to charge it with debts during coverture.² If the proper words were put into the will or in-

¹ A. V. Dicey, *Law and Opinion in England*, p. 370, note 2.

² A. V. Dicey, *Law and Opinion in England*, pp. 375-377.

strument that gave her the property, she could dispose of the income only. Equity made the husband trustee of the rents and profits but would not make him account for the wife's money more than one year back.

Equity did not purport to give a married woman the right to contract even in regard to her separate estate. It did give her power to create debts against her separate property. If she had no separate property at the time a debt was contracted but later acquired a separate estate, this estate was not bound by the debt and could not be taken to satisfy it. Equity gave her power to devise or bequeath by will her separate property but not the power to dispose of property which was not held for her sole and separate use.

The property rights of married women underwent a great change during the latter part of the last century by the enactment by legislatures of the Married Women's Acts. The first in Kentucky was passed in 1846. It provided that slaves and real property belonging to the wife at the time of the marriage or given, devised or descended to her during the marriage should not be subject to the payment of the husband's debts, created either before or after marriage. It further provided that the curtesy or life estate of the husband should not be sold by process of law except after the death of the wife, the husband surviving. The husband and wife could convey lands of the wife by their joint deed.³

The legislature in 1868 passed the following act relative to the separate estates of married women: "That where real property has been or shall hereafter be conveyed or devised to a married woman, for her separate use, without the intervention of a trustee, and without any restriction upon the sale or conveyance thereof during coverture, the right of such married woman to sell and convey the said property shall be the same as if the said property had been conveyed or devised to her absolutely, without any separate use being expressed; but her separate use shall continue in the proceeds of such sale."⁴ This act recognized the married woman's right to deal with her separate property at law as she had been already allowed to deal with it in equity.

³ Acts of 1846, p. 42.

⁴ Acts of 1867-8, p. 5.

The Weissinger Act of 1894, re-enacting a statute passed in 1893 and amending the same, purported to give a married woman the same power to deal with her general estates as the law of 1868 gave her over her separate estates. In fact it is generally supposed to have given her as full and complete power over both her personal and real property as those possessed by an unmarried woman, except that in order to convey land it is necessary for her husband to join in the conveyance.

Section 2127 of the Kentucky Statutes reads as follows: "Marriage shall give to the husband, during the life of the wife, no estate or interest in the wife's property, real or personal, owned at the time or acquired after the marriage. During the existence of the marriage relation the wife shall hold and own all her estate to her separate and exclusive use, and free from the debts, liabilities or control of her husband. No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability, upon a contract made after marriage, to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed or mortgage or other conveyance; but her estate shall be liable for her debts and responsibilities contracted or incurred before marriage, and for such contracted after marriage, except as in this act provided."

Section 2128 gives a married woman the right to acquire and hold property, both real and personal, as if she were unmarried and to sell and dispose of her personal property. She is given the right to make contracts, to sue and to be sued, as a single woman, "except that she cannot contract to sell, convey or mortgage her real estate, unless her husband join in such contract."

In section 2131 it is provided that "when the husband abandons the wife and lives separate and apart from her, or abandons her without making sufficient provision for her maintenance, or when he is confined in the penitentiary for an unexpired term of more than one year, or when he becomes permanently deranged in his mind, the wife, by judgment of a court of equity, may be empowered to sell and convey by her own deed any of her real estate."

And section 2147 gives a married woman, if she be of sound mind and twenty-one years of age, the right to dispose of her estate both personal and real, by will.

The constitutionality of this act of 1894 seems not to have been seriously questioned. The nearest to a discussion on this point was taken up in the case of *Rose, etc. v. Rose, etc.*,⁵ in which it was held that the act did not apply to property in which the husband had already acquired a vested right by marriage before the passage of the act. The court said: "The act is not retrospective in its operation. It cannot take from a husband the rights which existed under the law in force at the time of its passage. It is said by Mr. Cooley, in his work on Constitutional Limitations (5th Ed., p. 422): 'At the common law the husband, immediately on the marriage, succeeded to certain rights in the real and personal estate which the wife then possessed. These rights become vested rights at once, and subsequent alteration in the law could not take them away.'"

Professor Freund of the University of Chicago Law School has suggested that it is possible to argue that the state legislatures have no power to pass the married women's acts since marriage at common law gives the husband property rights in the wife's estates. As soon as marriage takes place these rights become vested, and any act of the legislature depriving the husband of these rights, which are inherent in the idea of marriage, is a taking of property without due compensation contrary to the provisions of the Federal Constitution. He further suggests, however, that courts of today probably would not consider the acts open to attacks on the ground of constitutionality.

The holding in the case of *Rose, etc. v. Rose, etc.*, was approved in *Mitchell v. Violet*,⁶ and several later cases. These cases show that where the marriage was solemnized before 1894 the husband has his common law rights, as modified by the acts of 1846 and 1868, in all the property acquired before that date. However, a wife who was married before the act of 1894 took effect is entitled to all the rights which the act purports to give her in property acquired after the act took effect.⁷

In the case of a marriage solemnized after the act of 1894 was passed, all the disabilities imposed on a married woman by the common law in the matter of ownership and control of her property, were removed with the exception that she was

⁵ 104 Ky. 48.

⁶ 104 Ky. 77.

⁷ *Rose, etc. v. Rose, etc.*, 104 Ky. 48.

not given the right to convey her real estate unless her husband join in the conveyance. This disability does not appeal to women as really being a limitation on their rights. Wives are accustomed to sign their husband's deeds when their husbands convey real estate and the requirement that their husbands join in their deeds seems a reciprocal matter. This, however, is far from the fact. When a wife signs a deed of her husband she thereby waives any right of dower in the property which might accrue to her upon the death of the husband, should she survive him. The husband can pass good title to his grantee even if the wife refuses to sign the deed. The grantee, of course, would take subject to the wife's life estate in one-third the property, contingent upon her surviving the husband. As a practical matter not many persons would be willing to purchase land subject to such a contingency. There is usually other property one can get that will answer his purpose just as well. If a purchaser were very anxious to secure a particular piece of land and the seller's wife were unwilling to sign the deed, the purchaser might be willing to take a chance on the husband's outliving the wife or the prospective buyer and the husband might enter into a contract whereby the husband would covenant to make such provision for his wife in his will that there would be little likelihood of the wife waiving her rights under the will and claiming her common law dower in case she should survive her husband; or the husband might give a bond binding his estate to indemnify the purchaser if the wife should survive and claim dower in the land conveyed.

At the present time it is impossible under our statute for a married woman to convey any of her real property by deed or otherwise unless her husband joins in the deed or has already conveyed in another instrument, except in special instances mentioned in section 2131, namely; where the husband has abandoned her, where he is confined in the penitentiary, and where he has become permanently deranged in mind; in which cases she may by permission of a court of equity convey her lands as if she were unmarried. It is a little difficult to see the justice in putting an owner of real property to the inconvenience of going to a court of equity for permission to convey what the law and everyone concedes is her own. This section of the statute can be justified only on the ground that a mar-

ried woman is not competent to convey real property without advice, which is to be given by a court of equity when the husband is so situated that he cannot give it.

In view of the newly acquired civil equality on the part of women, it is a little difficult to see why there should not be equal legal rights as to the requirements for conveying real property. When we search the court decisions for a satisfactory reason for this difference, we search in vain. It seems to be based on the old idea of the superior business acumen of the male sex.

In *Brady v. Gray*,⁸ the wife attempted to convey her land by deed while her husband was in a distant state. The court in holding the deed void, said: "This case aptly illustrates the wisdom of the statute that precludes the wife from conveying her real estate without her husband uniting with her." In *Phillips v. Hoskins*,⁹ the court comes nearest to giving an explanation for the difference. It said: "The purpose of the statute in requiring that the husband must join in conveyances of the wife's land is not only to protect the husband in his rights, but to protect the wife by giving her the counsel and guidance of her husband." "To be a conveyance of the wife's land under the statute, the deed must be the valid act of the husband, otherwise he has not conveyed."

From this it would seem that the husband has some property right in the wife's realty to be protected. The statute says a married woman has the same right to hold and acquire property, both real and personal, as if unmarried. His inchoate right to a life interest in one-third the wife's realty on the death of the wife certainly cannot justify this difference because the wife has the same inchoate interest in the husband's real property.

This failure to give the wife an equal right with the husband in the matter of conveying property works hardship under certain circumstances. Consider a situation like that in *Rose, etc. v. Rose, etc.*,¹⁰ where the husband and wife have permanently separated. If the wife is the one who has left the husband the case would not come within the provisions of section

⁸ 17 Ky. L. Rep. 512.

⁹ 128 Ky. 371, at 374.

¹⁰ 104 Ky. 48.

2131 and the wife would be unable to convey her own property; or take the case where the wife has a good offer to sell her land and the husband will not join in the conveyance as a matter of spite. A court of equity cannot compel him to convey as it could in the case of a wife's separate property before the present statute was passed. Here, as suggested by the writer's colleague, Judge Lyman Chalkley, the act of 1894 has decreased the rights of married women.

Furthermore, suppose a case where the wife is over twenty-one years of age and the husband is still a minor. The wife has an advantageous offer for her real estate but the buyer does not want to enter into a contract for the purchase of land that can be avoided by the seller's husband when the latter becomes of age. In *Lockhart v. Kentland Coal and Coke Company*,¹¹ a woman made a contract for the sale of mining rights on her land. She married a minor and then executed a deed in which her husband joined. The court said that the deed was void but as the husband had not joined in the petition to set the conveyance aside it held that the wife was estopped under the particular facts from taking advantage of it. In *Phillips v. Hoskins*,¹² the husband on coming of age disaffirmed a deed of his wife's lands executed while he was an infant and the court held the wife was not bound by the conveyance.

Another disadvantage under the present statute is that a wife cannot make a direct conveyance of her land to her husband, since as the court pointed out in *Sayers v. Coleman*,¹³ the husband must join in her deed and a person cannot be both donor and donee at the same time. A husband, however, may convey directly to his wife without the intervention of a trustee,¹⁴ and a wife, by having her husband join in the deed, may convey to a third person, who in turn may deed back to the husband.¹⁵ This is, to say the least, a very clumsy way of passing property from a wife to her husband and involves extra costs on account of the extra work of drawing and recording two deeds where one should answer the purpose.

¹¹ 182 Ky. 673.

¹² 128 Ky. 371.

¹³ 5 Ky. Opinions 733.

¹⁴ *Newby v. Cox*, 81 Ky. 58.

¹⁵ *Wicks v. Dean*, 103 Ky. 69.

It is interesting to note that although a wife cannot convey her own property without her husband's joining in the deed, if she holds land as trustee for another, she may transfer the property without her husband's uniting with her in the deed.¹⁶ If we are willing to concede that a married woman has sufficient business ability to dispose of property intrusted to her care without the necessity of securing the signature of her husband to the deed in order to make the transfer valid, it seems in accord with present day tendencies to grant to her the same right in regard to her own real estate.

By the time the next legislature meets in regular session, thirty years will have elapsed since the passage of the Weis-singer Act. During this time a much more chivalrous attitude toward woman has been taken than prevailed in the past and she has attained civil equality with man. It would seem a logical step for the next legislature to amend the present Married Women's Act so that she may have full legal equality with man.

¹⁶ *Antonini v. Straub*, 130 Ky. 10.